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# Supreme Court of the United States

OCTOBER TERM, 1943.

No. 850

ORANGE THEATRE CORPORATION, a corporation,
*Petitioner,*

vs.

HARRY BRANDT, DAVID WEINSTOCK, BENJAMIN WEINSTOCK, J. JOSHUA GOLDBERG, and EMANUEL HERTZIG,
*Respondents.*

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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### A

### Statement

In this case, five individual defendants were joined with several corporate defendants in a suit for treble damages and an injunction under the Sherman and Clayton Acts. The corporate defendants did not raise any objection or any jurisdictional questions and are now before the Court on their answers. The individual defendants are the only persons involved in the present litigation.

Before expiration of time of the individual defendants to answer or appear, stipulations were entered into by counsel for each side extending the time of the individual

defendants to answer or otherwise move with respect to the complaint. These stipulations reserved all rights of the said defendants. Counsel for the petitioner, on page 3 of his brief, says, "There is nothing in these stipulations from which to infer that the appearances of the respondents were under protest or limited to challenging the venue or jurisdiction over the person, or that they had any objection to the venue or jurisdiction, or that they decided to reserve their privilege of objecting to same." The converse of the situation is also true. When counsel for the petitioner signed his name to the stipulation and extended the time, he made no reservations to the effect that the operation of the stipulations was to be limited to what he now insists was the effect of the stipulations. When the plaintiff's attorney signed these stipulations, he did not impose any strictures or reservations upon the operation and effect of the stipulations. These stipulations gave no greater right, and none was asked for, than to respond to the complaint as permitted by the Federal Rules of Civil Procedure in all of their parts. When it is remembered that under Rule 12 of the Rules of Civil Procedure, a defendant may join the defense of lack of jurisdiction over the person and improper venue with his answer all in the one pleading, or initiate it by preliminary motion, the difficulty complained of falls, and this application becomes frivolous and must and should be denied in every event since only a question of interlocutory practice is before the Court.

Furthermore, in the earlier decision in the Circuit Court of Appeals in this case, now the law of the case (130 Federal 2nd, 195) these stipulations were held to be void and of no effect. On the remand of the record to the District Court, time was given to the defendants to renew their motion under Rule 6B so that the motion eventually was made as contemplated by the Rules and the additional time was given, not by stipulation, but by order, and obviously if the stipulations not having had Court sanction were void on the part of the defendants, they were void on the part

of the plaintiff for the same reason. Thus it is apparent that this is a frivolous application.

We should also like to call attention to the comment on behalf of counsel for the petitioner as to what the Circuit Court of Appeals decided on the First Appeal, contained at the foot of page 3 and at the top of page 4 of the petitioner's statement of facts in his brief before this Court. This statement is not at all consonant with the actual situation. It is true that the Circuit Court of Appeals reversed the order of the District Court, but the actual judgment is to be read in the light of the Opinion as the judgment was reversed and the case was remanded for further proceedings not inconsistent with this Opinion. Under the authority of the case of *Rogers* v. *Hill*, 289 U. S. 582, a reversal for proceedings in accordance with the opinion makes the opinion a part of the mandate. The Court's decision of a case is its judgment thereon. Its opinion is a statement of the reasons on which the judgment rests. On reversal, the opinion of the Court is clearly a series of instructions to the Court below as to what is to be done in the further development of the case.

The record below was encumbered with a reprint of all of the stenographic minutes of all of the arguments before District Judge Fake (App. pp. 27 to 123), which we believe are not a proper part of this record. What the District Court Judge had in his mind on a certain day or days, is unimportant. A court reviewing error is only interested in the orders, judgments, decrees, signed by the Court, and its opinions, so that whether Judge Fake was disturbed or troubled from time to time by the various arguments, as indicated on pages 4, 5 and 6 of petitioner's application here, is immaterial. In the argument before the Circuit Court of Appeals for the Third Circuit, on the last hearing, counsel for the appellant endeavored to use these minutes but was promptly told by Judge Biggs, President Judge of the Court, that the minutes were no part of the proceedings before the Circuit Court of Appeals. We find that they are offered as part of the record on the present

application for writ of certiorari. We have no doubt that this Court, in determining whether it should review and allow the writ, is not interested in the running argument between counsel and the Court in the District Court of the United States for the District of New Jersey. The comments of counsel for the petitioner, at the foot of page 6 and on all of page 7, as to what the Circuit Court of Appeals concluded in its opinions on either or both of the appeals, needs no comment here. Both of the opinions are before the Court and speak for themselves.

## B

## Jurisdiction

It is submitted that no substantial question is raised by this Appeal. There is no constitutional question involved or introduced anywhere in the record of this case. No substantial rights are decided. The Circuit Court of Appeals, in its last decision, review of which is sought here, concludes with the following important statement. "The dismissal of the complaint in such a situation, however, results solely from the lack of jurisdiction of the Court and is, therefore, not an adjudication of the merits of the cause of action. Consequently such a dismissal does not prejudice the right of the plaintiff to file another complaint when and if it appears that the Court may obtain jurisdiction over the person of the defendant" (Supplemental Appendix, p. 10). We have not been able to find a single instance where a review has been allowed under the law and facts such as appear in the instant case and we respectfully submit that the authorities relied upon by counsel in the third paragraph of this petition for a writ of certiorari, under Section B, marked Jurisdiction, and found on page 8, have no bearing on this case.

The petitioner first relies on *Bernards* v. *Johnson*, 314 U. S. 19, 62 Sup. Ct. Rep., p. 30. In this case (314 U. S., p 19 at p. 20), Mr. Justice Roberts, in the opening part of his opinion, says, "We took this case because it presents im-

portant questions of appellate practice under Section 75 of the Bankruptcy Act."

*Freeman* v. *Bee Machine Company*, 319 U. S. p. 448, 63 Sup. Ct. Rep. 1146, was a case arising on the question of removal of causes and whether or not a Federal Court, to which a case was removed, had full jurisdiction, the same as it would have had had the action originally been brought there, as distinguished from the limited jurisdiction of the State Court to allow amendments, the proceedings having originated in the State Court.

In *LeTulle* v. *Scofield*, 308 U. S. 415 at p. 421, 60 Sup. Ct. Rep. 313 at p. 316, Mr. Justice Roberts, writing for the Court said, "We took this case because the petition for certiorari alleged that the Circuit Court of Appeals had based its decision on a point not presented or argued by the litigants which the petitioner never had an opportunity to meet by the production of evidence. The Court affirmed the decision below stating that the respondent or appellee may urge any matter appearing in the record in support of a judgment but he may not attack it even on grounds asserted in the Court below in an effort to have this Court reverse it when he, himself, has not sought review of the whole judgment or of that portion which is adverse to him." Clearly when these three cases are closely examined, it is made manifest that the issues involved in them or any one of them are not similar or analogous to the issues involved in the case at bar.

## C

## Answer to the Alleged Questions and Points Presented

### Point I

The Court below, in its decision and mandate on the second appeal, made no departure from its decision and mandate on the first appeal, neither did it reverse its former decision in term or after the expiration of the term. The

issues before the Court on the second appeal were entirely different from the record as presented on the first appeal.

**Point II**

There was nothing revolutionary in the Courts' holdings that under the Rules of Civil Procedure, a defendant may challenge the jurisdiction of the Court over his person as a part of his answer filed under Rule 12. The revolution, if any, was occasioned by the adoption of the Rules of Civil Procedure and not by any interpretation put thereon by the Circuit Court of Appeals for the Third Circuit.

**Point III**

There was no error in the Courts' holding that the Rules of Civil Procedure abolished the age old distinction between general and special appearances. This ruling is not in conflict with the decisions of this Court and the decisions of other Circuit Courts of Appeal, which still hold, and correctly so, that while the right to enter a special appearance may be waived, the waiver must be voluntary. Waiver cannot and may not be invoked against a party and he cannot be said to have lost his right to object when, on the contrary, he has stoutly resisted jurisdiction from the very beginning.

**Point IV**

The Court below was not in error in deciding the second appeal on the ground of lack of jurisdiction over the person regardless of whether that particular ground was raised or urged by the parties, either before it or the Court below, the applicable principle being one which is well established in our law; namely, that a respondent or an appellee may urge any matter appearing in the record in support of a judgment (*LeTulle* v. *Scofield*, 308 U. S. 415 at page 421, 60 Sup. Ct. Rep. 313 at p. 316).

## Point V

The Court below, in deciding the second appeal, reached its conclusion because of the fact that these defendants had stoutly resisted the jurisdiction of the Court "in limine" and had not waived their right to object to being brought into the District Court of the United States for the District of New Jersey, when served in the Southern and Eastern Districts of New York in a suit under the Sherman Anti Trust Act and the Clayton Act.

## Point VI

There was no error in the holding below, in finding that the objection to jurisdiction over them was properly asserted, since the record before the Circuit Court of Appeals for the Third Circuit, on the second appeal, showed that proper objection had been raised before the District Court in accordance with the rules of the Court and in accordance with the practice outlined by the Circuit Court of Appeals when the case was before them on the first appeal.

## D

## Conclusion

It is respectfully submitted that the petitioner for the writ hopes that by tossing into the offing a lengthy record, encumbered with minutes, running argument before the District Court Judge, studded with decisions which we respectfully submit have no bearing on the issues involved, he may attract the Court's eyes to something which will give him a review here and a review which he is not entitled to have. The constitutionality of the Rules of Civil Procedure is not under attack. The decision of the Circuit Court of Appeals is not a final adjudication as to the merits of the controversy as the Circuit Court of Appeals clearly pointed out in its last opinion (Supplemental Appendix, p. 10). The petitioner cannot successfully urge before this Court as a proposition of law, that under Rule 12 one may not urge the jurisdictional objection either by motion be-

fore answer or in the answer itself. What petitioner does say is that under the facts in the instant case, these defendants lost their right, because of the stipulations which were entered into, to assert this important defense but the Circuit Court of Appeals, on the first appeal, practically struck the stipulations from the record and found that they were void and pointed the correct way of having time extended under the rules. Acting under the opinion of the Circuit Court of Appeals on the first appeal, these defendants applied to the District Court for their extension in the manner in which they should have applied in the first instance. It will be noted that the petitioner does not state that the District Court Judge abused his discretion by allowing these defendants an opportunity to renew their motion regardless of the stipulation and he could not successfully raise this as the Circuit Court of Appeals in the first appeal clearly found that counsel on both sides misapprehended the effect of their proposed stipulations. The law and the rules of the Court are clear. Counsel on both sides were in error in trying to stipulate additional times without a court order. That feature of the case disappeared when the record was remanded to the District Court. The Circuit Court of Appeals on the second appeal sustained the conduct of the District Court Judge in allowing further time to renew the motion.

The questions which were determined by the Circuit Court of Appeals for the Third Circuit are not within the compass of Rule 38 of the Revised Rules of the Supreme Court of the United States, Section 5, and especially Subsection B. The Circuit Court of Appeals for the Third Circuit did not render a decision in the instant case in conflict with the decision of another Circuit Court of Appeals on the same matter; it did not decide an important question of local law in a way probably in conflict with applicable local decisions; it did not decide an important question of Federal Law which had not been but should be decided by this Court; it did not decide a Federal question in a way

probably in conflict with applicable decisions of this Court, it did not so far depart from the accepted and usual course of judicial proceedings or so far sanction such a departure by a lower court as to call for an exercise of this Court's power of supervision. It applied fixed rules of law and the rules of Civil Procedure to the facts which it had before it and against it must be pointed out that there was no adjudication of the substantive rights of these parties.

There has been no final determination as to whether or not these individuals or any of them are liable in treble damages under the Sherman Act and Clayton Act and whether an injunction should pass against them, which is the relief sought in the complaint.

It is accordingly submitted that for all of the reasons above set forth, petition for a writ of certiorari to review the judgment of the Circuit Court of Appeals for the Third Circuit, should be denied.

Respectfully submitted,

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*Respondents*

## PETITIONER'S REPLY BRIEF

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

ISRAEL B. GREENE
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Newark 2, New Jersey

# Supreme Court of the United States

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## REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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(Emphasis and the like, ours, unless otherwise indicated. Reference "App." refers to Appendix of record in Court below. Reference "Supp. App." refers to Supplemental Appendix.)

**1**

We have compared respondents' brief side by side with our brief, and have matched point for point, and argument for argument, and we respectfully submit that respondents' brief has evaded discussing the merits of our application for a Writ of Certiorari.

In our main brief, we argued six principal reasons for the allowance of the writ, which we documented by specific references to the record, and supported by numer-

ous authorities. Our adversary's answer consists of mere naked denials of our reasons, without any attempt to support these denials, and without any attempt to answer our authorities. This "technique" is reminiscent of the Shakespearean couplet:

> "I have no other but a woman's reason:
> I think him so because I think him so."

**2**

It is to be noted that the respondents appear in this Court by new counsel. It is therefore not surprising that their brief contains a number of misstatements of fact and assertions, contrary to the record and the decision of the Circuit Court of Appeals below.

At page 1 of their brief the respondents say that the stipulations extending their time to answer, etc. were entered into *before* the expiration of their time to answer. This is not in accord with the record. Three of the five respondents had already defaulted when the first stipulation was entered.[1]

At page 2 of their brief they make the bold statement that the Circuit Court of Appeals below held that the stipulations were "void". That statement is contrary to the opinion of the court below. The Circuit Court of Appeals said that the stipulations were "ineffective" to extend the time. (Supp. App. 4; see also App. 16).

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1. Rule 12(a) of the Federal Rules of Civil Procedure affords a defendant 20 days to serve his answer. As is pointed out in the opinion of the Circuit Court of Appeals (Supp. App. 3-4) the defendants, Harry Brandt, David Weinstock and Benjamin Weinstock were served on October 17, 1940. Consequently their time to answer expired 20 days thereafter, or on November 6, 1940. The first stipulation extending the time of these defendants was not entered until November 7, 1940 (App. 4) or *one* day *after* their time to answer had expired.

The respondents' objection (page 3 of their brief) to the inclusion in the record here of the stenographic transcript of the proceedings before the District Court below, is inconsistent with the position they took before the Circuit Court of Appeals, and in any event, it is without merit.[1] They never filed any objections to the record on appeal. In their printed brief (page 4) filed with the Circuit Court of Appeals, the then counsel for the respondents said:

> "It was our first notion to move to delete all of the stenographic minutes as not constituting a proper or necessary part of the record on appeal. WE HAVE CONCLUDED TO LET THEM STAND * * *"

Counsel's statement (on page 3) that the Circuit Court of Appeals criticized the inclusion of the stenographic transcript referred to, is untrue.

**3**

The respondents cite *Letulle* v. *Scofield*, 308 U. S. 415 at 421, 84 L. Ed. 355 at 360 for the proposition that on appeal, any party may urge any matter appearing in the record in support of the judgment, and hence the Circuit Court of Appeals had a right to affirm on grounds different from the reasoning of the District Court and the Circuit Court of Appeals on the first appeal. A careful reading of the *Letulle* case will show that the rule therein enunciated does not apply to the case at bar. What the *Letulle* case holds is that where a lower court decides a question correctly, but assigns a wrong reason, the correct reason may on *direct appeal from the judgment*, be urged

1. The record on appeal before the Circuit Court of Appeals (which has been docketed in this court) includes the stenographic transcript of the proceedings before the District Court. Under Rule 75(b) of the Rules of Civil Procedure an appellant (petitioner herein) is afforded the right to include in his designation of the record on appeal, the transcript of the District Court proceedings.

to sustain the judgment. But there is nothing in the *Letulle* case which supports the novel proposition that a question which was *not* raised can be decided by an Appellate Court; and there is nothing in that case to support the revolutionary proposition that the theory adopted by the parties, and the District Court, and the Circuit Court of Appeals on the first appeal, can be altered by that Appellate Court on a second appeal, which is brought to enforce its mandate on the first appeal. Here, all the reasons in support of and in opposition to the original judgment of dismissal of Judge Walker were litigated and decided on the first appeal which our adversary admits "is the law of the case." It is not disputed that the object of the second appeal was to enforce the mandate issued on the first appeal. It certainly is too late on the second appeal to urge a question which was neither raised, litigated, nor decided in the prior proceedings. To concede the respondents' proposition is to render unstable the judgments of our Appellate Courts; indeed, to accede to their proposition is to cast the appellate process into a state of chaos.

## Conclusion

The unsoundness of the judgment of the Circuit Court of Appeals now being challenged is highlighted by the feeble defense made in its behalf by the respondents' brief. The importance of the questions raised on this application is attested to by the fact that on both appeals to the Circuit Court of Appeals that court ordered argument before the entire court *en banc*. We respectfully submit that these important and troublesome questions should be set at rest by this Court, and that a Writ of Certiorari be granted.

Respectfully submitted,

ISRAEL B. GREENE,
*Of Counsel with Petitioner.*